

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**





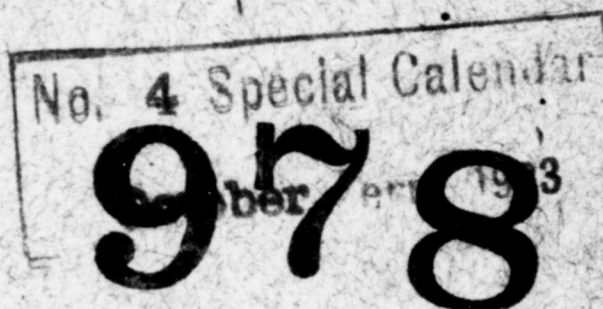
# TRANSCRIPT OF RECORD.

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Court of Appeals of the District of Columbia.

APRIL TERM, 1923.

No. 3946.



No. —, SPECIAL CALENDAR.

JAMES CLIFTON, APPELLANT,

*vs.*

UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF  
COLUMBIA.

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# Court of Appeals of the District of Columbia.

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No. 3946.

JAMES CLIFTON, Appellant,

vs.

UNITED STATES.

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*a* Supreme Court of the District of Columbia.

Criminal. No. 36456.

UNITED STATES, Plaintiff,

vs.

JAMES CLIFTON, Defendant.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Indictment.*

Filed in Open Court Oct. 4, 1920.

DISTRICT OF COLUMBIA, ss:

In the Supreme Court of the District of Columbia, Holding a Criminal Term, April Term, A. D., 1920.

The Grand Jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath, do present:

That on to wit the ninth day of April, in the year of our Lord one thousand nine hundred and twenty, and at the District aforesaid, one James Clifton, late of the District aforesaid, in and upon George William, sometimes known as George Williams, and hereinafter referred to as George William, then and there being, feloniously, violently, wantonly, recklessly and negligently did make an assault



in the following manner, that is to say, that the said James Clifton then and there was operating and driving, upon and along a certain public highway there situate, a certain motorcycle, wherein and whereon the said George William then and there was, as he, the said James Clifton, then and there well knew; and that he, the said James Clifton then and there feloniously, violently, wantonly, recklessly and negligently did force, drive and run said motorcycle against and upon a certain other vehicle, to wit, an automobile police patrol wagon, and then and there feloniously, violently, wantonly, recklessly and negligently did force, drive and run said motorcycle

2 into and against a certain obstruction, to wit, a curbstone; and that he, the said James Clifton, by so forcing, driving and running said motorcycle against and upon such other vehicle, and by so forcing, driving and running said motorcycle against such obstruction, as aforesaid, thereby then and there feloniously, violently, wantonly, recklessly and negligently did throw and cast and cause to be thrown and cast said George William from and from off said motorcycle to and upon the ground; and that he, the said James Clifton, by so forcing, driving and running said motorcycle against and upon such other vehicle as aforesaid, and by so forcing, driving and running said motorcycle against such obstruction, as aforesaid, and by so throwing and casting and causing to be thrown and cast said George William from and from off said motorcycle to and upon the ground as aforesaid, thereby then and there feloniously, violently, wantonly, recklessly and negligently did give to him, the said George William, in and upon the back and in and upon the spine and in and upon the head and in and upon the body of him, the said George William, several mortal wounds, fractures, bruises and contusions, of which said mortal wounds, fractures, bruises and contusions, he, the said George William, from the said ninth day of April, in the year aforesaid, to the tenth day of April, in the year aforesaid did languish, and, languishing, did live; on which said tenth day of April, in the year aforesaid, and at the District aforesaid, he, the said George William, of said mortal wounds, fractures, bruises and contusions, did die.

And so the Grand Jurors aforesaid, upon their oath aforesaid, do say:

3 That he, the said James Clifton, him, the said George William, in the manner and by the means aforesaid, then and there feloniously, violently, wantonly, recklessly and negligently did kill and slay; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

### Second Count.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That on to wit the said ninth day of April, in the year one thousand nine hundred and twenty, and at the District aforesaid, the said James Clifton, late of the District aforesaid, upon and along a



certain public highway there situate, a certain motorcycle, wherein and whereon one George William, sometimes known as George Williams, and hereinafter referred to as George William, then and there being, then and there was, as he, the said James Clifton, then and there well knew, feloniously, violently, wantonly, recklessly and negligently did drive and operate without due care and caution and with a reckless and wanton disregard for the safety of said George William; that is to say, that the said James Clifton, while he, the said James Clifton, then and there was under the influence of intoxicating liquor, then and there feloniously, violently, wantonly, recklessly and negligently did operate and drive said motorcycle upon and along such public highway at a great and excessive and unlawful and dangerous rate of speed, to wit, forty miles an hour, and that the said James Clifton, in and while operating and driving said motorcycle upon and along such public highway, then and there

4 feloniously, wantonly and recklessly did fail and neglect to attend to and control the steering mechanism and brakes of said motorcycle, and that the said James Clifton, in and while operating and driving said motorcycle upon and along such public highway, then and there feloniously, wantonly and recklessly did fail and neglect to keep an outlook for other vehicles; and that he, the said James Clifton, in and because of so operating and driving said motorcycle as aforesaid, thereby then and there feloniously, violently, wantonly, recklessly and negligently did cause and suffer said motorcycle to run into and collide with a certain other vehicle, to wit, an automobile police patrol wagon, and thereby then and there feloniously, violently, wantonly, recklessly and negligently did cause and suffer said motorcycle to run into and against a certain obstruction, to wit, a curbstone; and that he, the said James Clifton, in and because of so operating and driving said motorcycle as aforesaid, and in and because of so causing and suffering said motorcycle to run into and collide with such other vehicle, and in and because of so causing and suffering said motorcycle to run into and against such obstruction, as aforesaid, thereby then and there feloniously, violently, wantonly, recklessly and negligently did throw and cast and cause to be thrown and cast said George William from and from off said motorcycle to and upon the ground; and that he, the said James Clifton, by so causing and suffering said motorcycle to run into and collide with such other vehicle as aforesaid, and by so causing and suffering said motorcycle to run into and against such obstruction, as aforesaid, and by so throwing and casting and causing to be thrown

5 and cast said George William from and from off said motorcycle to and upon the ground as aforesaid, thereby then and there did give to him, the said George William, in and upon back and in and upon the spine and in and upon the head and in and upon the body of him, the said George William, several mortal wounds, fractures, bruises and contusions, of which said mortal wounds, fractures, bruises and contusions, he, the said George William, from the said ninth day of April, in the year aforesaid, to the tenth day of April, in the year aforesaid, did languish, and, languishing, did live; on which said tenth day of April, in the year aforesaid,



and at the District aforesaid, he, the said George William, of said mortal wounds, fractures, bruises and contusions did die.

And so the Grand Jurors aforesaid, upon their oath aforesaid, do say:

That he, the said James Clifton, him, the said George William, in the manner and by the means aforesaid, then and there feloniously, violently, wantonly, recklessly and negligently did kill and slay; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

JOHN E. LASKY,

*Attorney of the United States in  
and for the District of Columbia.*

(Endorsed:) Criminal. No. 36456 United States vs. James Clifton. Manslaughter. Witnesses: W. W. Easley, M. P. Herbert E. Martyn, M. D., Larena F. Cunningham, Walter A. Walker, M. P., Willard A. Fiefield, M. P., Thomas Hanley, M. P., Thomas L. Williams, Raymond G. Leeth. A true Bill: Bernard M. Bridget, Foreman.

6

Supreme Court of the District of Columbia.

Friday, October 15, A. D. 1920.

The Court resumes its session pursuant to adjournment, Mr. Justice Bailey presiding.

\* \* \* \* \*

Come as well the Attorney of the United States, as the defendant in proper person, according to his recognizance; whereupon the defendant being arraigned upon the indictment the reading whereof he specifically waives, pleads Not Guilty thereto, and for trial puts himself upon the country and the Attorney of the United States doth the like.

Supreme Court of the District of Columbia.

Wednesday, February 8, A. D. 1922.

The Court resumes its session pursuant to adjournment Mr. Justice Siddons presiding.

\* \* \* \* \*

Come as well the Attorney of the United States as the defendant in proper person, according to his recognizance, and by his Attorney, J. A. O'Shea, Esquire; and thereupon comes a jury of good and lawful men of the District of Columbia, to wit:—Chas. F. Fadely, Michael J. Lynch, Robert C. Rogers, Sol Louis, J. Edgar Robinson, Chas. Mallory, Henry R. Eberly, James C. Smith, Henry E. Patterson, James H. Scott, Arthur Browne, Joseph Rich, who being sworn to well and truly try the issue joined herein, are respited until the meeting of the Court tomorrow.



7 Supreme Court of the District of Columbia.

Thursday, February 9, A. D. 1922.

The Court resumes its session pursuant to adjournment Mr. Justice Siddons presiding.

\* \* \* \* \*

Come again the parties aforesaid, in manner as aforesaid, and the same jury that was respited yesterday; whereupon the said jury upon their oath say that the defendant is guilty in manner and form as charged in the indictment; \* \* \*

*Motion for A New Trial.*

Filed February 13, 1922.

\* \* \* \* \*

Now comes the defendant, by his attorney, James A. O'Shea, and moves the Court for a new trial in the above entitled cause for the following reasons:

1. That the verdict was contrary to the evidence.
2. That the verdict was contrary to the weight of the evidence.
3. That the verdict was contrary to the law as given to the jury by the Court.
4. That the Court erred in instructing the jury.
5. That the Court erred in refusing to admit evidence contrary to law.
6. That the Court erred in admitting evidence contrary to law.
7. That new and material facts have come to light since the trial.

JAMES A. O'SHEA,  
*Attorney for Defendant.*

8 *Motion in Arrest of Judgment.*

Filed February 13, 1922.

\* \* \* \* \*

Now comes the defendant by his attorney, James A. O'Shea and moves the Court to arrest the judgment in the above entitled cause on the following among other reasons:

1. Because the indictment does not allege an offense.
2. Because the said indictment is defective and insufficient in that the alleged offense attempted to be set forth was not set forth with sufficient certainty, precision, definiteness and accuracy, to apprise the defendant of the offense that he must be prepared to meet at the Trial Table.

3. Because said indictment is too vague, uncertain and indefinite in law to charge a crime.

4. Because said indictment was fatally defective to charge in law a crime.

5. Because there were many variances between the allegations of the indictment and the proof at the Trial Table.

6. Because there was much left for intendment and inference.

7. And for other reasons appearing on the face of the record.

JAMES A. O'SHEA,  
*Attorney for Defendant.*

9 Supreme Court of the District of Columbia.

Friday, May 12", A. D. 1922.

The Court resumes its session pursuant to adjournment, Mr. Justice Siddons presiding.

\* \* \* \* \*

Come as well the Attorney of the United States, as the defendant in proper person, in custody of the Superintendent of the Washington Asylum and Jail and by his Attorney J. A. O'Shea, Esquire; and thereupon the defendant's motion for a New Trial and Motion in Arrest of Judgment coming on to be heard, is by the Court overruled, to which action of the Court the defendant by his Attorney prays an exception which is noted; and thereupon it is demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him, and he says nothing except as he has already said; whereupon it is considered by the Court that for his said offense, the said defendant be taken by the Superintendent aforesaid, to the Asylum and Jail aforesaid, whence he came, thence to the Penitentiary as designated by the Attorney General of the United States there to be imprisoned for the period of Three Years (3) to take effect from and including the date of arrival of said defendant at said Penitentiary; and thereupon the defendant by his Attorney notes an appeal to the Court of Appeals of the District of Columbia, from the judgment of the Court in this case; whereupon the Court fixes the amount of bond for costs in this case on appeal at One Hundred Dollars.

10

*Memoranda.*

June 5, 1922.—Bond for costs on appeal to Court of Appeals, approved and filed.

June 26, 1922.—Time to submit Bill of Exceptions extended to and including July 20, 1922.

July 17, 1922.—Bill of Exceptions submitted.



## Supreme Court of the District of Columbia.

Friday, December 1st, A. D. 1922.

The Court resumes its session pursuant to adjournment, Mr. Justice Stafford presiding.

\* \* \* \* \*

By Justice Siddons.

Now comes here the defendant by his Attorney, J. A. O'Shea, Esquire, and prays the Court to sign and make a part of the record his Bill of Exceptions taken during the trial of the case and submitted to the Court on the 17th day of July, 1922, which is accordingly done, *nunc pro tunc*.

*Assignments of Error.*

Filed December 29, 1922.

\* \* \* \* \*

Now comes the defendant, James Clifton, by his attorney, James A. O'Shea, Esq., and assigns for review to the Court of Appeals of the District of Columbia, on appeal in the above entitled cause, the following errors committed by the Trial Court:

- 11      1. In failing to require the United States to elect upon which count of the indictment the defendant would be tried.
2. In failing to require the United States to elect upon which averment in the first count the defendant would be tried.
3. In failing to require the Government to elect upon which averment in the second count the defendant would be tried. (Rec. 1.)
4. In sustaining the objection interposed by the Government on the cross-examination of one Walter A. Walker as to his reason for not stopping the patrol when he saw the light of the oncoming motorcycle up the street.
5. In sustaining the objection of the United States to the question propounded of one Walker on cross examination on behalf of the defendant as to why it was that the witness Walker kept right on going with the patrol wagon.
6. In permitting the Government to ask the leading question of the witness Raymond G. Leeth.
7. In permitting the witness Raymond G. Leeth to give his reasons as to what there was about the motorcycle that led him to believe it was going at a great rate of speed, (rec. 16) and in overruling the motion of the defendant at the close of the Government's case to direct a verdict of not guilty on the second count, on the grounds stated in the motion.
- 12      8. In overruling the motion to direct a verdict of not guilty on the first count upon the ground that the various averments in the indictment had not been made out, the indictment



alleging excessive speed, failure to control the steering mechanism and brakes and failure to keep a look out for other vehicles.

9. In overruling the motion to direct a verdict of not guilty upon the first count which charged negligence generally and did not charge it specifically so as to advise the defendant of the particular charge he is called upon to meet.

10. In permitting the Assistant U. S. District Attorney Bilbrey, Esq., to misconduct himself by asking the defendant while under cross examination if, on September 5, 1917, he was not arrested and convicted in the Police Court for driving a motorcycle more than twenty miles an hour, on the complaint of J. Bobo.

11. In permitting the Assistant U. S. District Attorney J. H. Bilbrey, Esq., to misconduct himself by exhibiting in front of the Jury a paper while asking the above question and reading from it without the Assistant District Attorney having the proper proof of the facts of conviction.

12. In permitting the Assistant U. S. District Attorney Bilbrey to misconduct himself by asking the witness (defendant) if he had not been convicted in the Juvenile Court.

13. In permitting the Assistant U. S. District Attorney J. H. Bilbrey to misconduct himself by asking the questions and getting before the Jury, the matter contained in the questions relating to the alleged convictions of the defendant, without the proof.

14. In permitting the Assistant U. S. District Attorney to misconduct himself by asking the defendant if on May 24, 1918, he had not been convicted in the Police Court for driving a motorcycle thirty miles an hour on the complaint of William Warren.

15. In refusing to withdraw a juror on account of the misconduct of the Assistant U. S. District Attorney.

16. In requiring the witness to answer that he had not been convicted in any court, Police Court or any other court.

17. In permitting the Assistant U. S. District Attorney to misconduct himself by asking the witness if he had not forfeited collateral.

18. In refusing the defendant's prayer No. One.

19. In refusing the defendant's prayer No. Two.

20. In refusing the defendant's prayer No. Three.

21. In modifying the defendant's prayer No. Three.

22. In refusing the defendant's prayer No. Four.

23. In refusing the defendant's prayer No. Six.

24. In refusing the defendant's prayer No. Seven.

25. In refusing the defendant's prayer No. Nine.

26. In refusing the defendant's prayer No. Ten.

27. In refusing the defendant's prayer No. Twelve.

28. In charging the jury in the manner it did as to the test of gross negligence.

14 29. In charging the jury as to the bearing the speed of the defendant might have upon the defendant's innocence or guilt.

30. In reviewing the testimony before the jury.

JAMES A. O'SHEA,  
*Attorney for Defendant.*



*Designation of Record.*

Filed December 30, 1922.

\* \* \* \* \*

The Clerk will please make up the record for the Court of Appeals, to consist of the following:

1. The indictment.
2. The plea.
3. Verdict of the jury.
4. Motion for a new trial.
5. Motion in arrest of judgment.
6. Order overruling motion for new trial and exception thereto.
7. Order overruling motion in arrest of judgment and exception thereto.
8. Appeal noted.
9. Cost bond.
10. Orders extending time for filing bill of exceptions and transcript of record.
11. Bill of exceptions submitted.
12. Bill of exceptions.
13. Assignment of errors.
14. This designation of record.

JAMES A. O'SHEA,  
*Attorney for Defendant Clifton.*

15            Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 14, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 36456, Criminal, wherein United States is Plaintiff and James Clifton is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 9th day of January, 1923.

[Seal Supreme Court of the District of Columbia.]

MORGAN H. BEACH,  
*Clerk.*

E. W.

16 In the Supreme Court of the District of Columbia, Holding  
a Criminal Term.

Criminal. No. 36456.

UNITED STATES

vs.

JAMES F. CLIFTON, Defendant.

*Bill of Exceptions.*

This cause coming on for trial before the Honorable Frederick L. Siddons, of the Supreme Court of the District of Columbia, and a jury, on the 8th day of February, A. D. 1922, the United States being represented by Jos. H. Bilbry, Esq., Assistant District Attorney, and the defendant being represented by James A. O'Shea, Esq., the following proceedings were had:

Counsel for the defendant moved that the United States be required to elect upon which counts of the indictment the defendant would be tried, which motion was overruled and an exception noted on behalf of the defendant.

Counsel for the defendant then moved that the United States be required to elect upon which averment in the first count the defendant would be tried, which motion was overruled and an exception noted on behalf of the defendant.

Counsel for the defendant then moved that the United States be required to elect upon which averment in the second count the defendant would be tried, which motion was overruled and an exception noted on behalf of the defendant.

17 The Government to maintain the issues on its part joined, called one JAMES WILLIAMS, who testified substantially as follows: That he lives at Fairmont, W. Va.; that he is the brother of George D. Williams; that between April 9th and April 12, 1920, he identified the body of George D. Williams at the Morgue.

That then and thereupon the Government to further maintain the issues, jointly called on LEWIS W. WILLIAMS, who testified in substance that he lived at 176 Dolphine Street, Baltimore, Maryland, and was a brother of the preceding witness James Williams and a brother to George D. Williams, deceased. That prior to April 9, 1920, his brother, George D. Williams lived in Washington, on K Street. That he came to Washington to work for the government. At the time he met his death he was living with his aunt in Washington, D. C. On April 9th 1920 he identified the body of Geo. D. Williams at the District of Columbia Morgue.

That then and thereupon counsel for Government to further maintain the issues on its part joined, called one WILLIAM SCHOENBERGER,



who testified substantially as follows: That he is Morgue Master of the District of Columbia; that between April 9th, 1920 and April 12, 1920, Louis W. Williams, 176 Dolphin St., Baltimore, and his brother, identified a body at the Morgue as being the body of George D. Williams.

That then and thereupon the Government to further maintain the issues on its part joined, called one Dr. HERBERT E. MARTYN, who testified substantially as follows: That he is a physician and Deputy Coroner of the District of Columbia; that on April 9, 1920 he was Deputy Coroner; that of April 12, there was a body identified to witness by Mr. Schoenberger as George D. Williams, 2602 K St., N. W., colored man, 29 years of age, weight about 165, about 5 feet 8 inches in height. The body was nude when witness saw  
18 him and showed evidence of a suture of a wound on the scalp in the occipital region. There was bruises over the left thigh and abdomen; no fracture of the skull.

On opening the body it was found that he had had a fracture of the lumbar vertebræ down in the lower part here (indicat-  
19 ing); that the intestines were lacerated and hemorrhagic, as if from come contusion. The cause of death was a fracture of the back with hemorrhage and shock.

That the autopsy was performed three days after life had been extinct. He must have died somewhere else. He was not brought immediately to the morgue.

That then and thereupon the Government to further maintain the issues on its part joined, called one WILLIAM W. EASLEY, who testified substantially as follows: That he is sergeant of the Metropolitan Police Department and has been for 20 years; that he does not know the defendant, James Clifton. That on April 9, 1920, about 9:25 or 30 o'clock, P. M., witness was following the police patrol wagon in a- automobile, with a Mr. Cunningha-, across Q Street, at an entrance of New Hampshire Avenue there was two men on a motorcycle going South at a very high speed. When they got within a few feet of the patrol wagon, they whirled to the right—whirled west to the right, then aimed to cut around the front of the patrol wagon. They struck some part of the patrol wagon and that threw them out of the witness' sight. Witness was a little in the rear of this patrol wagon. The patrol wagon stopped at that time. He parked it against the curb on the east side of New Hampshire Avenue and witness got out. They had been thrown south of the patrol wagon. That put them out of sight; that is the two men who were on this motorcycle and when he got around on the south side they were loaded on an automobile and had started to the hospital. Witness did not get a look at them as they were going at a very high rate of speed. They were twenty yards, might have been further from the patrol wagon when witness first observed them. Witness does not know whether it struck the wheel or the fender or what. Witness couldn't tell that when the collision occurred the



patrol wagon was very near across New Hampshire Avenue. The motorcycle was going about 40 or 50 miles per hour.

Cross-examination :

It was a small machine he was on. Don't know whether it was cloudy or clear; don't think the streets were slippery; don't  
20 remember whether they were slippery or not; don't remember as to their condition. Were about ten paces behind the patrol wagon; the patrol wagon was about 30 feet in front of us; had been following the patrol for some time; for some distance; not positive as to the street; they had been out several squares east of where this collision occurred to search a house; at New Hampshire Ave. and Q St. there is a little piece of parking. Don't remember whether there was any shrubbery there in the Park that night; don't recollect anything about it; could see him just as plain as witness sees cross-examiner; he was about 20 or 30 yards north of the patrol wagon when witness discovered him on New Hampshire Avenue; to the best of witness' judgment in that 20 yards witness could be able to know that he was going about 40 or 45 miles an hour. Defendant was on the right of patrol; he was north of it. The patrol wagon was going west and defendant was coming south; that would throw him on the right of the patrol wagon. The motorcycle tried to get out of the way of the patrol; turned to the right, and then aimed to whip around in front of it to the left. The patrol wagon was between witness and the motorcycle, after the motorcycle turned to the left; when defendant turned to the right, they were both going in the same direction as witness. It was somewhere about ten miles an hour that the patrol wagon was going. As witness followed the patrol wagon he did not notice any perceptible lessening of the speed of the patrol wagon until the motorcycle man aimed to whirl to the left; then the patrol wagon stopped. The automobile in which Mr.  
21 and Mrs. Cunningham and witness were, came to a stop as soon as the patrol wagon stopped, we pulled in to the curb and witness got out and went around south of the automobile to see what the trouble was. When the patrol wagon stopped it was very near across New Hampshire Avenue and Q Streets. To witness' knowledge it was not across. It might have been within a few feet of being across, but witness don't remember that it was all the way across. The machine in which witness was stopped and witness got out as soon as he could, got to the patrol wagon as soon as he could; to the best of witness' recollection it was within a few feet of the west curb; the motorcycle at that time was laying about 25 feet south of New Hampshire Avenue, near the curb, to the best of witness' recollection; the west curb of New Hampshire Avenue. There was a motorcycle with two men on it. One driving it and the other man sitting behind him on the machine. He whirled around in front of the patrol wagon, on New Hampshire Avenue, but when he whirled around in front, then he went out of the witness' sight; and witness couldn't tell then what took place. He made an effort to avoid the patrol wagon. The occupants of the patrol wagon were Walker, the operator; Private Tom Hanley, McLucas and Fiefield. Walker was



operating the patrol wagon and Hanley was on the seat with him, and Fiefield and McLucas were in the patrol wagon proper.

That then and thereupon the following occurred:

By the Court:

"Q. I am not sure whether you said anything about it or whether it was in a statement made here by somebody: Did you say in your testimony that the motorcycle struck the patrol wagon? A. I couldn't say whether it did or not.

22 "Q. You did not see him strike it? A. No, I couldn't state, you know.

The Court: I had the impression somewhere——

Mr. O'Shea: I had the impression that way too, if your Honor please, that he said it went out of his sight, and then the next he saw was when it struck the patrol wagon.

The Witness: I will explain it over again. It won't take long. When it got within a few feet of the patrol wagon it turned to the right, in the same direction; turned west, the same direction the patrol wagon was running. Then it aimed to whip around in front.

The Court: Well, I understand that.

The Witness: Well, I couldn't tell whether it struck or not.

Mr. O'Shea: I was under the impression that he had so testified and that is the reason I was trying to develop the fact, may it please the Court, that the patrol wagon was between him and the motorcycle.

The Witness: If I did say that I saw it struck, it was a mistake. I did not mean to say that. I couldn't say whether it struck or not. I was under the impression that it had escaped.

The Court: Well, that is all.

That then and thereupon the Government to further maintain the issues on its part joined called one JOHN CUNNINGHAM, who testified substantially as follows: That he lives at 3601 Lowell St.; that on April 9, 1920, witness was in the neighborhood of Q Street and New Hampshire Avenue about nine o'clock that evening. Mrs. Cunningham and Sergeant Easley were in the machine with him.

23 Witness was going west. Witness was following the patrol wagon. Witness was going west on Q St. The motorcycle was coming down at a very high rate of speed, and it struck the front end of this patrol wagon, and then witness immediately stopped his car and got out and went to the patrol wagon. When the motorcycle struck the patrol wagon, the patrol was over the other side of New Hampshire Avenue, near the curb; near the intersection of the sidewalk. Still on Q St., but was near the intersection of the west curb line of New Hampshire Ave. Witness was behind the patrol wagon, directly behind it, and witness was going about 8 or 9 miles an hour; the motorcycle was going at a pretty fast rate of speed, from the sound of the exhaust, witness should judge it was going in the neighborhood of 35 or 40 miles an hour; witness has driven automobiles, is acquainted with the noise that a motorcycle makes; does not know who was on the motorcycle; saw two colored boys on it;



after the motorcycle struck the police patrol witness could not see what became of it. All witness could see was the back end of the patrol wagon; so witness stopped his car and went out and looked around, and witness saw the motorcycle in the middle of the street: that is New Hampshire Avenue—it was south of the patrol wagon, about 20 or 30 feet. Witness didn't see the passengers of the motorcycle at that time; did not see them at all; did not see a man there by the name of Leeth. Did not see a man there by the name of Williams; from where he was witness could tell that the motorcycle had attempted to go in the rear of the police patrol down south on New Hampshire Avenue.

24 Cross-examination:

There is a small park at that intersection; witness does not remember whether or not there is some shrubbery there or was there at that time. Witness first noticed the motorcycle at 18th and New Hampshire Avenue; 18th and New Hampshire Avenue is about 100 feet from New Hampshire Avenue and Q Street. There is that little triangle there; the noise from the exhaust was particularly noticeable; did not hear any horn blown; did not hear any gong sounded; neither on the patrol wagon nor on the motorcycle; when witness first noticed the motorcycle witness had just crossed over 18th Street going west on Q Street; just got over the intersection; just about where the little park is. The patrol wagon was about 30 or 40 feet ahead of witness; witness was at the park and the patrol was 30 or 40 feet ahead of witness; witness does not know what the width of Q Street is there from the west to the east part of that little park. As the defendant got near the patrol wagon he seemed to swerve from the right to the left, as if he didn't know which way to go; whether to go ahead of it or behind it. Witness noticed the motorcycle coming down New Hampshire Avenue a hundred feet from the corner of Q Street where the patrol wagon was; then the motorcycle swerved back and forth. The motorcycle swerved to the left and right; it went in front of the patrol; then the witness' view was obstructed when it got in front of the patrol. Witness saw the

motorcycle go into the front end of the patrol. It did not go  
25 by the machine; the motorcycle left witness' view; after witness heard the crash of the motorcycle hitting into the front of the patrol, then witness lost sight of the motorcycle; witness heard the crash before the motorcycle left his view. The front part of the motorcycle ran into the patrol. Witness did not hear any signal given at any time by either the patrol or the motorcycle; witness does not recall if he had his windows up or not; his car is a left hand drive. Sergeant Easley was sitting at the left of me; Mrs. Cunningham was in the center; it is a coupe. Witness saw the motorcycle south of the patrol wagon in the middle—don't know if it was in the middle or not—it was near the middle of New Hampshire and below the patrol wagon; it was between P and Q on New Hampshire Avenue; the front end of the patrol wagon was very close to the south curb of Q St. It was on an angle, the patrol



wagon, when witness walked up to it, was almost directly on the intersection of the walk on Q St., with the nose of it facing south, near the curb, near the south curb; that it had been turned around, the patrol wagon had turned around. It was near the south curb of the street. It was not in the center of Q Street. The rear end of it was about in the center, but the front end was headed south.

That then and thereupon the Government to further maintain the issues on its part joined called on WALTER A. WALKER, who testified substantially as follows: That he is a member of the

26 Metropolitan Police Department, attached to No. 7 Precinct; that on the night of April 9, 1920, at 9 o'clock in the night, he was in the neighborhood of New Hampshire Avenue and Q Streets, was going through Q St. Witness had been on 12th St. to get some stolen stuff that was stolen from Mr. Cunningham. Coming through Q St. when he struck 18th. It runs across New Hampshire Avenue. There is a triangle there—I rang my bell—was proceeding between 8 and 9 miles an hour; in the Overland patrol wagon; it has a ratchet bell, a big gong on it. You pull this and throw the ratchet down and pull it back and then throw it down and pull it up again and it will ring for three blocks, continue ringing. When witness struck across 18th St. and striking into New Hampshire, witness looked to his left, looked south to see if anybody was coming. Then witness looked up New Hampshire Ave. about a little beyond Cochran St. and witness saw a light. It came down on witness' right side, went around witness, and his left front handle grab struck the end of witness' fender. The left hand grab struck on witness' right front fender. Hit witness' right front fender, just put a kind of pin scratch on it. The motorcycle went around on the southwest curb, and he struck it, and he threw the man off in the middle of the sidewalk. Struck the southwest curb of New Hampshire Avenue, throwing the man that was on the rear off the motorcycle. The man was sitting on the rear of the other man on the motorcycle when he was thrown off. He was thrown on the sidewalk on the south side of New Hampshire Avenue; on the sidewalk; so the motorcycle went around the curb going south about 30 or 35 feet, and threw himself off and broke his arm. Motorcycle went 5 or 10 ft. more and struck the curb again and went out in the middle of New Hampshire Avenue about 15 or 20 feet. Witness got out; Clifton the defendant, the man who was operating the car was laying up between the sidewalk and the parking, and he was picked up and put in a Dodge touring car; forgets name of the man who had the car, but could pick him out if he is in Court; it

27 was Mr. Leetch, a tall young red headed man. When he first saw the motorcycle it looked to be about 250 feet away. It was just a little beyond Cochran St.; Cochran St. is between Que and R Sts. Witness heard a noise like he had his cut out open. From what witness observed he thought the motorcycle was going about 40 or 50 miles an hour. When the motorcycle collided with the patrol the latter was about 5 or 6 feet west of the curb of New Hampshire Avenue.



## Cross-examination:

Witness did not ring this bell for three blocks; he rang it just before he started over 18th St.; that is witness struck the crossing into 18th St. coming west. Noticed a little triangle there—a little park—there were some bushes in that.

That then and thereupon the following occur-ed:

By Mr. O'Shea:

"Q. Why didn't you stop your machine when you saw that light up the street?

"Mr. Bilbrey: I object to that, if your Honor please.

"The Court: What is the theory of that question, Mr. O'Shea?

"Mr. O'Shea: The theory is just this, he said on his direct examination he saw the machine a distance away, so that they could get by. Now, I want to know why he did not stop.

"Mr. Bilbrey: You asked him that, and that came out.

"Mr. O'Shea: I didn't ask him anything of the sort. Now, it is a question for this jury, may it please the Court to find out whether Walker tried to beat this defendant across the street or not.

"The Court: What he did, is the inquiry.

"Mr. O'Shea: That is what I am trying to find out.

"The Court: But you are asking him what he thought  
28 he could do.

"Mr. Bilbrey: He asked him why he did not stop.

"Mr. O'Shea: I still submit that question and ask the Court to rule upon it.

"Mr. Bilbrey: It doesn't make any difference why he didn't stop?

"Mr. O'Shea: If the Court please, if the Court tells me why I will be glad not to. I ask him why he did not stop when he saw this light up the street.

"The Court: Now, let me see. You ask him why he did not stop in his crossing New Hampshire Avenue?

"Mr. O'Shea: No, crossing Q Street there. He was crossing Q Street at New Hampshire Avenue.

"The Court: Crossing Q Street.

"Mr. O'Shea: I want to know why he did not stop.

"The Court: What was it that you meant by crossing Q Street, in your question?

"Mr. O'Shea: If the Court please, as I tried to bring out by the previous witness, there is an axis there, or intersection, at New Hampshire Avenue and Q Street, and right at that point is where Q Street crosses New Hampshire Avenue. I think the question is clear, if your Honor please.

"Mr. Bilbrey: Now, if your Honor please——

"Mr. O'Shea: If you will just let me finish, I am trying to make it plain to the Court.

"Mr. Bilbrey: I am trying to assist the Court, too.

"Mr. O'Shea: All right. I will sit down, then. Go ahead.

"The Court: The Court will assist itself.



29 "Mr. O'Shea: That is what I was trying to do, if Your Honor please, give what assistance I could.

"The Court: The objection to the question is sustained.

"Mr. O'Shea: We reserve an exception, may it please the Court.

"The Court: Yes."

Witness has been driving that Overland patrol wagon about three years. Witness was going between 8 and 9 miles; there was nothing to obstruct witness' view as he looked to his right up New Hampshire Avenue. There was nothing to obstruct view as he looked to the left. As witness looked up the street to his right he noticed this light. Did not know whether or not it was a motorcycle; could hear the cut-out and it sounded like a motorcycle; saw it coming towards him. There was a machine in front of me on Q Street, backing around about 50 feet from the corner afterwards identified the car; the man is in Court, he doesn't remember his name, but it isn't Leeth. It was right ahead of witness. Witness didn't stop, slowed up after witness got across the street. Pretty near about 5 or 6 feet of it. The Overland is a right hand drive; witness was on the left hand side. Witness doesn't know if motorcycle tried to avoid patrol wagon. If he had tried to avoid the patrol wagon he would have slowed up. He would not have run in front of me. Witness slowed up after he got 6 feet over the intersection, pretty near the intersection of the street he slowed up. So that anyone could pass in the rear of him. After witness got across there he came around on witness' right hand side and passed witness on his right side. The defendant was going south and witness was going west; he was on my right hand side coming south. He was on my right. Witness put on brakes after defendant had hit him. He touched right fender and put a pin cratch on it.

That then and thereupon the following occurred:

Q. What did you mean when you said that you saw the motorcycle about 25 feet away and you kept on going. A. Because I was ringing the bell and I have the right of way. The patrol wagon—ambulances and patrols have the right of way. They are supposed to slow up when we ring the bell.

Q. But you kept right on going? A. Yes sir. I could not stop.

Q. You couldn't stop. A. What did I have to stop for?

Q. Why not? Why couldn't you stop? A. I would be stopping all the time if I stopped every time I saw a light.

Q. Why could- you stop there that night? A. Because I had rung my bell, and he was about 250 feet from me.

Q. You kept right on going? A. Yes sir.

Q. Why couldn't you stop?

Mr. Bilbrey: One moment. I object, if your Honor please.

The Court: Yes, you don't need to go into that.

The Witness: I have the right of way.

Mr. O'Shea: I am going to ask, subject to your Honor's ruling, why it was that he kept on going.

The Court: I sustain the objection to that.



Mr. O'Shea: If your Honor please, in his direct examination he said he kept on going.

The Court: And he has said it again.

Mr. O'Shea: I want to know why he kept on going.

31 The Court: He has told you his reason for it, and now you are asking him a question about stopping.

Mr. O'Shea: Because it was brought out in response to a question that I asked him.

The Court: The question to which an objection was made, "Why couldn't you stop." Now an objection is made to that question and the objection is sustained.

Mr. O'Shea: I ask it on this theory, may it please the Court. If this man did not have his machine under control, so that he could not stop it, then I want this jury to know it. If he was going at the rate of speed he says he was, he would have been able to stop that machine within 6 or 9 feet.

The Court: As I understood it, he does not pretend that he even tried to stop it. He said that he kept on going, and then you ask him why he did not stop, and to that question I sustained an objection.

Mr. O'Shea: I reserve an exception on the ground stated.

The Court: All right."

32 That then and thereupon the Government to further maintain the issues on its part joined, called RAYMOND G. LEETH, who testified substantially as follows: That he lives at 1829 Cochran St. N. W.; that on April 9th, he was driving an automobile on 18th St. at the intersection of Q St.; was going north; did not see a patrol wagon; saw a motorcycle going down—going south on New Hampshire Ave. across 18th St. in front of me; saw it as far down New Hampshire Avenue as it could be seen. There was buildings along the street. Saw it come into view on New Hampshire Avenue and keep on New Hampshire Avenue to Q St. After witness lost sight of it did not see it again until after he heard the crash, the crash was almost immediately after witness had seen it go by him. Saw it cross 18th St. in front of witness and go up toward Q Street; then witness lost sight of the motorcycle on account of the buildings on Q Street and 18th on the south side of Q Street; no buildings in front of witness on Q Street; could see motorcycle cross that little triangle in the middle of the street. There is only a low hedge there.

That then and thereupon counsel for the defendant objected to the leading form of questions asked by the District Attorney.

When witness saw the patrol, he could not see it as it passed Cochran St. but it came into view just a little south of that; saw it after it had crossed Cochran Street. That witness has driven an

33 automobile for about six years; that he has driven a motorcycle for about three years. That between the time witness saw the motorcycle just south of Cochran Street and the time that it went out of sight on Q Street he could not see how fast



it was going, but witness knew it was going at a great rate of speed.

That then and thereupon counsel for the defendant objected to the response that "he knew it was going at a great rate of speed," but the Court stated that was competent.

That then and thereupon the following occurred:

By Mr. Bilbrey:

"Q. What was there about it that led you to believe that it was going at a great rate of speed? A. When it passed in front of me it had the cut-out wide open; and from my experience with motorcycles, I can generally tell——

"Mr. O'Shea: I object, if your Honor please.

"The Court: Well, he is giving his reasons why——

"Mr. O'Shea: I object to him giving his reasons.

"The Court: I think that is competent.

"Mr. O'Shea: We reserve an exception, please."

That then the witness states that the motorcycle passed in front of him, directly in front of him, so that I would not know how fast it was going, but it had the cut-out open and the motor was going at a great rate of speed, so that witness could hear it. Could hear the explosion coming so fast that even *it* witness had not seen it he would have known that it was going at a great rate of speed. After the crash he was going across Q St.; witness went around this little

34 triangle at the intersection of New Hampshire and Q Street, and went along up to where the accident happened; the motorcycle was lying in the street; there were two colored men; one of them was lying in the middle of the street, in New Hampshire Avenue. Did not notice where the other one was. Witness stayed in his machine, but some policemen there put the injured men in the machine and witness took them to Emergency Hospital with the officer. Did not know who the injured men were at the time. Found out at the hospital that one of them was Clifton, but did not get the other man's name; never heard the other man's name; does not recognize Clifton in the Court room; would not recognize him if he saw him.

Cross-examination:

Was going north on 18th Street; was just about to cross the street at Q Street; had not crossed the building line, looked to the right and left as he crossed Q Street; did not notice any patrol; did not notice any patrol gong sounded; did not notice any horn; did not hear any horn that sounded as if it might be on a patrol wagon. Does not recall that he noticed any horn at all. There is a little park there with some shrubbery; the park is on the north side of Q Street and witness had not quite got across the south building line of Q Street; had not crossed Q Street; had got to about the building line on Q Street, but had not crossed it when witness first saw the motorcycle; never saw the patrol. Could not have seen it from where



he was if it had been near the place where the accident happened. His view was obstructed by the buildings, the corner buildings on 18th Street; witness was going fourteen or fifteen miles an hour. Crossed Q Street after he saw the motorcycle; he heard the motor going; heard the exhaust. The motor could have been going and the machine not moving; after the crash he came up at the point of the triangle and turned around into New Hampshire Avenue. It was then that these two men were placed in witness' machine. After witness drew alongside of the place where the accident happened. One of the men seemed to be badly injured and the other one was on the ground groaning and saying that his back was hurt. Does not know which one it was. Knows that there was one of the men telling the man not to touch his back. They were taken to Emergency Hospital; witness drove to the hospital. There was an officer in the machine; and the two men and witness.

That then and thereupon the Court interrogated the witness as follows:

By the Court:

"Q. Just one question. Coming up north, as I understand you to say, you were on 18th, to the point where you first got a glimpse of the motorcycle. Is 18th Street west or east of New Hampshire Avenue? A. If you could draw a diagram there, I could show you just how it is. I was going north on 18th Street.

"Q. I know you were, but as you approached Q Street on 18th Street, going north—is 18th Street at that point west or east of New Hampshire Avenue? A. Why, New Hampshire avenue crossed 18th street at an angle of about forty-five degrees and goes into Q Street and makes a triangle of it.

"Q. The triangle is made by what, now? A. There is a little park——

36 "Q. Well, that is the form it takes? A. Yes.

"Q. Is that made by the converging of those streets? A. There is three streets coming together there. There is New Hampshire Avenue, Q Street and 18th St.

"Q. Now, what I want to get at is, at that point is 18th Street entering New Hampshire Avenue from the west side or the east side of New Hampshire Avenue, or the westerly side or the easterly side, since New Hampshire Avenue itself is not north and south street? A. Well, sir, I do not quite understand you.

"The Court: Never mind."

When witness approached Q Street, New Hampshire Avenue was to his left, it was to the west.

That then and thereupon the Government to further maintain the issues on its part joined, called one WILLARD A. FIEFIELD, who testified substantially as follows: That he is a member of the Metropolitan Police Department, attached to No. 7 Precinct: That on April 9th, at about nine o'clock he was in the neighborhood of Q Street and New Hampshire Avenue, N. W., was in No. 7 Patrol;



that he saw a motorcycle about thirty feet south of the southwest corner of New Hampshire Avenue—the Southwest corner of New Hampshire Avenue and Q St.; the only thing that witness could say in regards to the case is that he heard the wagon men on the patrol wagon say, 'Look out', and at the same time, or about a second or two later, he heard a crash, and upon getting out of the patrol wagon, which he did immediately afterwards, witness walked  
37 to the southwest curb of New Hampshire Avenue and Q Streets, and approximately six or seven feet from the southwest curb of New Hampshire Avenue and Q Street he found the body of the man named Williams laying on the sidewalk; immediately placed him in the automobile operated by Mr. Leetch who lived at 1800 and something Cochran Street, and after placing him in the machine with Mr. Leetch, witness went to the body of James Clifton, which was lying about five feet west of the motorcycle on New Hampshire Avenue, and placed him in the machine also, and took both people to the Emergency Hospital in company with Mr. Leeth. Witness has heard motorcycles in operation; has ridden on them. That witness did not hear a motorcycle just previous to the crash; never heard anything until the man said 'Look out.' Just previous to the accident he could not say what rate of speed the patrol wagon was being operated, but in witness' mind it was not making over twelve miles an hour. It was a very low rate of speed. Witness was on the inside of the patrol wagon; it was an enclosed patrol wagon.

Cross-examination:

The patrol is open at the front and back to a certain extent; it is the same as the majority of the patrols. Has a screen inside of the patrol, which permits one to look out through the screen; there is not anything to prevent witness hearing what is going on in front; the screen in front of the patrol wagon naturally would give witness sufficient hearing that he would — heard what the man would  
38 say; that is how he heard what the man in front said; he could hear what was said; he could hear what was going on; the back of the patrol is open; the occupants of the patrol wagon that night were witness, some colored girl and Mr. McLucas. The first thing witness heard was when the wagonman said 'Look out.' The man that repeated the words was not the driver, Walker; the wagonman who repeated the words was Hanley; he was in the front of the patrol wagon with the driver. Could not say that he heard any gong sounded. In his judgment the patrol was going about 12 miles an hour. Picked up Clifton and helped him in machine; did not notice that he was bleeding because he was in such a hurry to get him to the Emergency Hospital, that witness did not notice anyone's wounds in particular, until after they arrived at the hospital.

That then and thereupon the Government to further maintain the issues on its part joined called one THOMAS HANLEY, who testified



substantially as follows: That he is a member of the Metropolitan Police Department, attached to No. 7 Precinct; that he recalls the night of April 9; that about 9:25 he was in the neighborhood of New Hampshire Avenue and Q Street; was on his way coming west to No. 7 Station in the patrol wagon; was going west; on Q Street; when he was in the neighborhood of New Hampshire Avenue and Q Street that night he saw a motorcycle. When he first saw it it was between Cochran and R Street-, north of where I was; the patrol wagon was at that time just striking into New Hampshire Avenue.

39 There is a triangle between 18th and New Hampshire Ave. Just as he got into New Hampshire Avenue witness saw this headlight up New Hampshire Avenue north; could not hear it at that time; later heard it; motorcycle finally came down to where witness was; we were almost across New Hampshire Avenue, coming west, and I happened to cast my eyes over on the south side of Q Street just west of New Hampshire Avenue and there was a gentleman backing his machine out. The motorcycle passed us and the left handlebar on the motorcycle struck the right tip of the fender, the right front fender. After they hit us they went across on the south side of Q Street, over the sewer there, where there is a round covering. They struck that right on the point, and the man that was on the back of the machine, he was thrown off, thrown up into the air, and he fell right down in the middle of the sidewalk. The machine continued down about 20 or 25 feet—25 or 30 feet—and it struck the curb again, and the rider was thrown off there. Then it went down about 10 or 15 feet further and struck the curb again, and then it went out into the street about 15 feet and dropped in the street. That he does not know personally who was driving the motorcycle; that he understood Clifton was the operator; to the best of witness' knowledge and belief the motorcycle was going between 40 and 50 miles an hour from the time witness saw it and the time it collided with the fender of the patrol wagon. The patrol wagon was not moving when the motorcycle struck it. He had put his brakes on and stopped it. Witness was about four

40 or five feet from the west curb line of New Hampshire Avenue when the motorcycle struck the car. The front of the patrol wagon was headed southwest when it was struck by the motorcycle. There was a sewer manhole right on the southwest corner of Q and New Hampshire; the motorcycle struck it; the curb would have come around there if there was not the sewer trap there. In place of that, there is a covering of cement, and it answers the place of the curb around there over the manhole. There is a little parking in there between 18th and New Hampshire to the north of Q Street. There was a few little bushes, about that high (indicating). Witness saw the motorcycle coming down the street and saw it make an effort like he wanted to get in front of the patrol wagon; to go west; the patrol, witness knows, was not going twelve miles an hour at that point; that he had looked at the speedometer a short while before; witness judged speed of motorcycle from where he was between Cochran and R Streets to the time he got to witness. Witness had not gone more than 30 feet while motorcycle was coming a



square and a half. Patrol was not going over 12 miles an hour. Witness does not know that there was an automobile beyond the patrol; he did not notice it; he understands there was but he did not see it.

That then and thereupon the Government announced the foregoing as the Government's case.

Mr. O'Shea: If your Honor please, I am going to make a motion to direct a verdict on the second count, and I may say in passing it looks as if the Government is hoisted by its own petard in this case.

The second count alleges that 'he did drive, without due care and caution, and with a reckless and wanton disregard for the safety of said George Williams, that is to say, that the said James  
41 Clifton, while he, the said James Clifton, was then and there under the influence of intoxicating liquor.'

There is not a single live of evidence in this case about the defendant being under the influence of any intoxicating liquor. If the things which he is supposed to have done while under the influence cannot be predicated upon that proposition, then I submit there is no evidence, so far as the second count is concerned, to submit that count to the Jury.

"The Court: Well, what do you say about that proposition, Mr. Bilbrey?

"Mr. Bilbrey: If your Honor please, I haven't anything to say, because there is nothing left for me to say. There is no dispute on that point, that the man was under the influence of liquor. I am satisfied from my investigation of the witnesses that he was not. I don't know why it was ever put in the indictment.

"The Court: Well, look at the second allegation. What is your claim in that allegation?

"Mr. O'Shea: If your Honor please, I simply took your Honor's construction of the count that we have just been through in the Lewis case. Your Honor, in the Lewis case, held that 'While under the influence of liquor' controlled all the other averments of the count. That being so, he did those things while under the influence of liquor. Now, there being no evidence that he was under the influence of liquor, the count must fail, because if he did not do them under the influence of liquor, it does not support the averment of the indictment.

42 "The Court: Well, I don't know that I went so far as you state, because in that case there was plenty of evidence on the question of intoxication.

"Mr. O'Shea: I know that, but it was my viewpoint, may it please the Court, that that averment just referred to that one particular feature, and your Honor will remember when you instructed the jury you told the jury that while under the influence of liquor he did this; he failed to control the steering mechanism; and while under the influence of liquor he failed to keep a lookout for other vehicles; and, while under the influence of liquor, he did so and so. Your Honor will remember that when you were addressing the jury,



I invited your attention to the fact, and you said you had the indictment in front of you.

"The Court: That various alleged negligence in the other indictment, all followed the averment that he was then and there under the influence of intoxicating liquor, and did then and there feloniously, wantonly and negligently, and so forth. I did not have to pass upon the question of whether or not the averment was essential to an indictment charging manslaughter under such circumstances; but construed, if I construed it at all, with reference to the evidence tending to show that he was under the influence of liquor, which did not support that averment.

"Mr. O'Shea: The- in this case it could not be construed, as far as this defendant is concerned, upon that theory. Those things that were done by the defendant, under the second count, were done while  
43 under the influence of liquor, which the Government assumes to prove, but there is no proof of it, and it seems to me that the count cannot stand.

"Mr. Bilbrey: If your Honor please, I have never known the law to be that where a number of allegations of negligence were alleged in an indictment, that it was incumbent to prove every one of them; that if they proved any one of them, it made out the crime, and they had gone far enough.

"Mr. O'Shea: Have you proved any of those averments in the second count; as far as this defendant is concerned, while he was under the influence of liquor?

"Mr. Bilbrey: I maintain that I do not have to prove them under the influence of liquor, because being under the influence of liquor is just a greater degree of the same negligence.

"Mr. O'Shea: You have shifted your viewpoint since the Lewis case. That is the same indictment; the same count, absolutely, except that it is a motorcycle instead of an automobile.

Mr. Bilbrey: The allegation of being intoxicated simply heightens the others. I never maintained that without this the others would not constitute an offense.

"Mr. O'Shea: Let us see what this count reads, if Your Honor please.

(Mr. O'Shea, reading:)

"Said James Clifton, upon and along a certain public highway there situated, a certain motorcycle, wherein and whereas one George Williams, sometimes known as George Williams, hereinafter  
44 referred to as George Williams, then and there being, then and there was, as the said James Clifton then and there well knew, violently, feloniously, wantonly, reckless and negligently did drive, and operate without due care and caution and with a reckless and wanton disregard for the safety of said George Williams, that is to say"—

Now, we are describing how it was done.

—"that the same James Clifton, while he, the said James Clifton then and there was under the influence of intoxicating liquor, then and there violently, feloniously, wantonly, recklessly and negligently did operate and drive said motorcycle upon and along such public high-



way at a great, excessive, unlawful and dangerous rate of speed, to wit, forty miles an hour; that the said James Clifton, while operating and driving said motorcycle along and upon such public highway, then and there", and it again refers back, as was done in the other indictment—"then and there feloniously, negligently and recklessly did fail and neglect to control the steering mechanism and brakes on the motorcycle;

"Said James Clifton, while operating and driving said motorcycle upon and along said public highway, then and there feloniously, wantonly and recklessly did fail and neglect to keep an outlook for other vehicles; and that he, the said James Clifton, in and because of so operating and driving said automobile as aforesaid"—how? Under the influence of liquor! (Continuing reading): "thereby then and there feloniously, viol-t-, wantonly, recklessly and negligence did cause and suffer said motorcycle to run into and

45 collide with a certain other vehicle, to wit, an automobile police patrol wagon, thereby then and there feloniously, violently, wantonly, recklessly and negligently did cause and suffer said motorcycle to run into and against a certain obstruction, to wit, a curbstone, and that he, the said James Clifton, in and because of so operating and driving said motorcycle as aforesaid, namely, while under the influence of liquor—and because of suffering said motorcycle to run into and collide with such other vehicle, and because of so causing and suffering said motorcycle to run into and against such obstruction as aforesaid, thereby then and there feloniously, wantonly, recklessly and negligently did throw and cast, and cause to be thrown and cast, said George Williams from and off the said motorcycle to and upon the ground; that he, the said James Clifton, by so causing and suffering said motorcycle to run into and collide with such other vehicle as aforesaid enumerated, while under the influence of liquor, by so causing and suffering said motorcycle to run into and against such obstruction as aforesaid, and by so throwing and casting and causing to be thrown and cast said George Williams from and off said motorcycle to and upon the ground as aforesaid, thereby defendant did give to him, the said George Williams, bruises and injuries that thereafter followed."

Now, we are called upon to meet that averment, that while under the influence of liquor he did these things.

"Mr. Bilbrey: I think the real test of this proposition is whether or nor the averment as to being under the influence of Intoxicating liquor, may be stricken out and still leave a count of criminal negligence; and I submit to your Honor if that allegation was  
46 out there would still be an allegation of criminal negligence of manslaughter in this case. Mr. O'Shea; assumes the proposition that everything alleged must be proven as alleged. We know that in these indictments under a statute where it says that if a man does one thing or another thing or another thing he is guilty of a crime, and they are all alleged, and if only one of those things are prove-, the crime has been made out. The true test in all of these cases being as to whether or not those averments upon



which there is no proof could be stricken out of the indictment and still leave sufficient to charge the crime. I think in this count there would be plenty of allegations, supported by the testimony, to allege the crime.

"Mr. O'Shea: We are called upon to meet that situation as it detailed in the second count. Now, we come here and we find that there is not the situation at all; there is not one line of proof that this defendant was under the influence of intoxicating liquor.

"Mr. Bilbrey: You are all the better off, then.

"Mr. O'Shea: Well, that is not through any effort of yours that I am any better off. It is because the evidence did not support your count. We, we are called upon, may it please the Court, to meet that situation, and we find that entirely different situation. Now he wants to shift his ground, and say "Oh, no, we brought you into Court to meet the situation that while under the influence of liquor you did these various things. Now, we cannot prove that, but we still turn around and strike out 'while under the influence of liquor' and you can meet us in this situation without being under the influence of liquor.

47 "Mr. Bilbrey: Do you maintain that doing these things without being under the influence of liquor would amount to a crime or not?

"Mr. O'Shea: I am not answering that. I am answering what I am called upon to meet here. I am not speculating upon what I would have to meet.

"Mr. Bilbrey: If those allegations left that out and still stated a crime, I maintain it is not necessary.

"The Court: The question is whether or not the real purpose of the indictment is sufficiently met, as is charged here. The charge against Clifton is, that he then and there feloniously, violently, wantonly and recklessly and negligently did drive and operate, without due care and caution, with a reckless and wanton disregard for the safety of said George Williams. That is to say, that the said Clifton was then and there under the influence of intoxicating liquor and then and there feloniously did the thing set out, in one of the several ways set out.

"Mr. O'Shea: May it please the Court, how does the Government reconcile that count with this Sinclair case?

(Reads citation referred to.)

"The Court: Suppose there had been no averment about intoxication here, and the indictment was otherwise in the form which I find it at the trial of this case, do you concede that evidence of intoxication would have been admissible at this time?

"Mr. O'Shea: No, sir, I do not.

"The Court: As bearing upon the question of negligence?

48 "Mr. O'Shea: No sir, because we are not charged specifically with that.

"The Court: Intoxication in and of itself is not an act of negligence, necessarily.



"Mr. O'Shea: It might be an act of luxury, but it is not an act of negligence.

"The Court: It is contended that under the circumstances a man acted negligently and, as bearing upon his negligence, showing at the moment that he was driving at an excessive rate of speed or otherwise negligent, that he was then and there under the influence of liquor,—is it contended that that would not be competent, as bearing upon the question of his guilt?

"Mr. O'Shea: I don't think so, unless it was charged, no sir, your Honor.

"The Court: Oh, I think so. I haven't any doubt about it.

"Mr. O'Shea: Well, that is what makes horse races, if your Honor please—the difference of opinion. Now, in the Sinclair case——

"The Court: In that Sinclair case, in some instruction or charge of the Court, the Court indicated any act of negligence, and the appellate court said no.

"Mr. O'Shea: What I had in mind, though, if your Honor please, was to invite your Honor's attention to the indictment which was passed upon, and it strikes me that this averment is not surplusage, 'while under the influence of liquor', and your Honor gave the jury that instruction, as I remember the situation, in the Lewis case.

"The Court: Of course, I haven't that part of the record here, but the Court might have committed some error then which it  
49 must not repeat now.

"Mr. O'Shea: I cannot conceive that this Court would commit an error and then in such a short time attempt to correct it.

"If your Honor please, just look at the punctuation (reading): 'That is to say, that the said James Clifton, while he, the said James Clifton, then and there was under the influence of liquor.'

"The Court: Suppose it said 'to wit' instead of 'that is to say'?

"Mr. O'Shea: Was under the influence of intoxicating liquor, I think it would hold just as it is now.

"The Court: I think it would, because they mean the same thing, but is the pleader bound by it?

"Mr. O'Shea: I think in criminal pleading he is, yes, sir. The rule, as your Honor well knows, is that the pleading is taken against the pleader strongly, in a criminal case. Now, 'while he, the said James Clifton, while under the influence of intoxicating liquor'——

"The Court: Supposing there was nothing else but the allegation with regard to intoxicating liquor, that, in and of itself, is not an act of negligence. Intoxication may have a bearing upon whether a person is negligent, but of itself it is not necessarily an act of negligence.

"Mr. O'Shea: That is upon the theory that one drink doesn't make a man drunk, I suppose.

"The Court: One drink might sometimes so affect the mind of a person that it would make a person negligent when he would not have been negligent otherwise. But, we have here these words, and they could be stricken from that indictment and it would still  
50 charge in the customary form. Why it was introduced here I do not know. The only question that I think your motion



raises is whether or not that is so much a part of the charge of this indictment—of the charge that is made against this man, that the pleader must be held bound by it. That is the question. If he is bound by it, then your motion must prevail.

“Mr. O’Shea: But suppose for the moment we eliminate the words and take the first averment: A man might drive forty miles an hour on a public highway and it would not be negligence; but if he was driving forty miles an hour on a highway, while under the influence of liquor, it would be an entirely different proposition.

“The Court: Not if nothing happened.

“Mr. O’Shea: I know, but the possibility of something happening, may it please the Court——

“The Court: But we are not trying a man on possibilities.

“Mr. O’Shea: We are taking this count as we find it, and I am trying to follow that line of reasoning to see where he would be; to see what we are prepared to meet as we come into Court. The indictment charged us with doing these things while under the influence of liquor.

“The Court: I think that is a question here, whether that part of the indictment constitutes a part of the charge that is brought against this man.

“Mr. O’Shea: I think I have some authorities in my office, if your Honor please, on that proposition. I think there is one case from Missouri.

51 “The Court: I am afraid that in a criminal case, a Missouri case will not make a very strong appeal to me.

“Mr. O’Shea: Why was that second count put in there, if they did not attempt to narrow it down to that situation? If your Honor please, we can take the Lewis indictment, which we just passed upon, and we came into court with that indictment. We were prepared to meet the issue that the defendant was under the influence of liquor. Here we come into court with the same idea in mind, and lo and behold there is not one line of evidence introduced upon that point. I have compared the Lewis indictment with this indictment, may it please the Court, and it is almost verbatim.

“The Court: Well, of course I don’t remember now how far I went in that case.

“Mr. O’Shea: I could have that written up, if your Honor please, if you would like to have it.

“The Court: This question was not raised.

“Mr. O’Shea: If your Honor please, when you came to charge the jury, if you will remember I stood upon my feet and I took exception to your Honor saying to the jury in the Lewis case that these things had to be done while under the influence of liquor. I specifically mentioned each one of them.

“The Court: Well, don’t spend any time or expense on that, because there was an acquittal in that case.

“Mr. O’Shea: Perfectly true, but your Honor had in mind this same question yesterday afternoon.

“The Court: Well, if you have any cases you can bring them in the morning.



52 "Mr. O'Shea: Very well, your Honor, I think I have one about that averment.

"Mr. O'Shea: Now, may it please the Court, since the hour of adjournment yesterday, I have had the record written up in the Lewis case. I will hand your Honor your charge to the jury in that case. My impression of your construction of the indictment in the Lewis case was the same as the construction I am contending for here in this case. I shall be glad to hand this to your Honor, or I shall be glad to read it to you. I have marked the passages in lead pencil all the way through. Your Honor will note that you have considered that averment 'while under the influence of liquor' as referring to the different alleged acts of negligence.

"The Court: Let me see it please.

(Counsel hands same to the Court.)

"The Court: Well, this is not just what I thought I said.

"Mr. O'Shea: Did your Honor read the last of it, where it is marked?

"The Court: Yes, I did. I read all the passages that you have marked.

"Mr. O'Shea: Toward the end 'It is for you to say whether or not this man, driving this car on this occasion, was under the influence of liquor,' etc.

Now, we have the same indictment in this case, and I certainly was led to believe that the same construction would be put upon the indictment in this case as was put upon the indictment in that case.

53 If your Honor please, in the case of Schultz versus State, this is the case that I had in mind last night when I told your Honor that I thought I had a case from Missouri. It is 89 Nebraska Reports. (Reads citation referred to.)

"The Court: Was that a homicide case?

"Mr. O'Shea: Yes, sir; an automobile case.

"The Court: It rests on the question of negligence?

"Mr. O'Shea: Yes; unless there was negligence there could be no conviction.

"The Court: That is perfectly true. And in this case there cannot be any conviction unless there is gross negligence.

"Mr. O'Shea: That is correct, your Honor. The matter is for your Honor's consideration. That is all I have to offer.

"The Court: Now, Mr. Bilbrey, have you anything?

"Mr. Bilbrey: If your Honor please, I do not have any case exactly in point, but there is a case of Anderson vs. United States, in 170 United States, Page 481. (Reads citation referred to.)

"The Court: Wasn't that dealing with it as a matter of variance, or was it duplicity, or what?

"Mr. Bilbrey: A matter of duplicity, as in this case.

"Mr. O'Shea: They held that he could have raised it on demurrer, and that after judgment it came too late.

"The Court: The Court was considering whether the count was



duplicitous, aside from the question whether it could have been raised after sentence?

54 "Mr. Bilbrey: Yes, sir.

"The Court: A question of duplicity?

"Mr. Bilbrey: Yes, sir.

"The Court: I do not think that is the question that we have here. As I understand the pending motion, Mr. O'Shea claims that there is a variance between the charge in the indictment and the proof—a variance consisting in the failure to put in prima facie evidence on the case of intoxication at the time of the alleged occurrence.

"Mr. Bilbrey: That was the effect of this case that I have just read, if your Honor please. They alleged that he killed by shooting, and that he killed him by drowning. There was no proof of the drowning at all. That allegation went unsupported. The court held that in they proved that it was done on either one of those ways or any of those ways, that was sufficient.

"Mr. O'Shea: Well, I do not quarrel with that, but I say that here you say that those things were done while under the influence of liquor, and you have no proof on that at all.

"The Court: Yes. You may have alleged several grounds of negligence in one count, without exposing the count to duplicity. Your evidence may be directed to only one of the specifications of negligence. It does not follow because you have not put in any evidence as to the other that there is no negligence.

"Mr. Bilbrey: That is the position that I take in this case, that the charge is a general charge that he recklessly and negligently did drive and operate without due care and caution and with reckless  
55 and wanton disregard for the safety of said George Williams; that is to say. Then we come down to the specifications.

Then they specify these specific things, one of which we have not proved, but the others we have proved.

"Mr. O'Shea: How do you get away from that language 'That is to say, said James Clifton, while he the said James Clifton then and there was under the influence of intoxicating liquors, then and there feloniously, wantonly, and negligently did operate and drive', following with the other averments?

"The Court: Oh, as I understand it, the motion is based on the ground of variance, that is to say, that the evidence put in by the Government varies from the charge laid in the indictment. It is claimed that an essential part of the charge is the averment as to being under the influence of liquor. Now, the offense of course primarily that the defendant is charged with, is manslaughter by gross negligence. The language of the indictment, that he did this thing while under the influence of liquor,—it is not important whether he was under the influence of liquor or not, if the evidence shows gross negligence; a grossly negligent act in the driving of the machine, which resulted in the death of some one. Now, I have examined the question, and I think it comes under that rule which holds that it is no variance, where the averment is one merely of aggravation. I think if there had been no reference to being under the influence of liquor in this indictment, but the other specifications of



negligence appearing in the count and upon the trial the prosecutor introduces evidence among other things, that at the time of driving he was under the influence of liquor, it would be perfectly  
56 competent evidence as bearing upon the question of negligence. It is not like those averments in an indictment which are descriptive; unnecessarily descriptive. For instance, where a defendant is accused of larceny of a brown horse and the evidence shows that it was a black horse; that is fatal. The offenses that he comes into Court prepared to meet is the charge that he stole a brown horse. It was not at all necessary to have effectively charged him with larceny to have used that descriptive matter, but there we have the old common law rule applying. But where the averment is a matter of aggravation, a different rule applies. I think we have quite a strict application of its example in a comparatively recent case from the Supreme Court of Iowa. *State versus Bresee*, 137 Iowa, Page 673. (The Court reads citation above referred to.)

"The Court (continuing): I think this indictment sufficiently charges, under the established principles prevailing in this jurisdiction—sufficiently charges manslaughter by gross negligence, irrespective of the question of whether at the time of the alleged acts of negligence the defendant was or was not under the influence of liquor. That being so, it is apparent that the averment that he was under the influence of liquor was simply aggravation. The question whether a person was under the influence of liquor at the moment, at most, might be important as bearing upon the question of negligence. A person might be held grossly negligent who commits a negligent act influenced by voluntary intoxication, when the  
57 same acts might, though negligent, not reach the rank of gross negligence. It is a question of aggravation, I think, and a question that bears upon the conditions under which the defendant committed the act alleged. You could not possibly be deceived as to the kind of evidence that you are called upon to meet, because the offense charged is manslaughter. Intoxication, standing by itself, is no part of that charge; it could not be. It is not an act of negligence within the meaning of the particular offense charged here. It may be evidence of negligence, tending to show negligence in a given case.

Therefore, I shall overrule the motion.

"Mr. O'Shea: To that we reserve an exception.

"The Court: Yes.

"Mr. O'Shea: As far as the particular averments are concerned, we ask the same motion for the various averments contained therein, namely, that there is no evidence that he did fail and neglect to attend to and control the steering mechanism and brakes on such motorcycle.

The only proof in this case, may it please the Court, if any, is that the defendant was going at an excessive rate of speed. That is all the Government has proved in this case. The only testimony in the case, as far as the motorcycle is concerned, is that it touched the patrol wagon or the patrol touched it, as one of the bright Government witnesses said, 'He could hear the scratch.' There is not one



line of evidence as to what the condition of the motorcycle was after the alleged accident.

"The Court: Well, the foot guard was damaged.

"Mr. O'Shea: Yes, I have that, if your Honor please.

58 "The Court: That is about all I remember as to the condition of the motorcycle.

Mr. O'Shea: That is all. In fact, none of the other averments there are presented to us except the one of excessive speed. If your Honor cares to be refreshed upon that, I shall be glad to read the testimony to you.

"The Court: There was some evidence by some witness in the case. I think it was Mr. Cunningham who testified—I am not sure whether it was Mr. Cunningham or Sergeant Easley—that as the defendant approached the patrol he seemed to move this way and then this way.

"Mr. O'Shea: That was Mr. Cunningham's testimony, if your Honor please.

"The Court: Yes. Well, I think that testimony, what ever weight the jury may give to it, may bear upon the question of whether he was controlling or attempting to control his brakes. I think I will overrule your motion.

"Mr. O'Shea: May that apply to each one of the various averments?

"The Court: Yes.

"Mr. O'Shea: And your Honor will allow us an exception?

"The Court: Yes. There is one as to the dangerous rate of speed and then this one that we have just spoken about. And then, to fail and neglect to keep an outlook for other vehicles. Those are the only three, I think.

"Mr. O'Shea: Yes, sir, excessive speed, failing to attend and control the steering mechanism and brakes, and failure and neglect to keep an outlook for other vehicles.

"The Court: I think I will allow the count to stand.

"Mr. O'Shea: And to that we have an exception.

59 "The Court: Yes.

"Mr. O'Shea: Now, as far as the first count is concerned, we ask to direct a verdict upon that count, because it charges negligence generally, and does not charge it specifically. I think that if the second count is sustained, then the first count must go out. In other words, we do not know what we are called upon to meet in this case.

"The Court: What is the theory of these first counts here, Mr. Bilbrey: What is the theory of the Government about them?

"Mr. Bilbrey: If your Honor please, when there is a general averment of negligence here, our theory is——

"Mr. O'Shea (interrupting): If you don't catch us on one you will catch us on the other.

"Mr. Bilbrey (continuing): Any element of negligence going to make up those averments may be introduced in testimony. Then, in order to make it more specific, there is a second charge specifying



what we deem are several elements of negligence in the particular case.

"The Court: Now, didn't the Court of Appeals, in the Sinclair case, rather restrict the evidence under a general count like this?

"Mr. O'Shea: Yes, sir.

"The Court: My recollection is that some language of the trial court was criticised there.

"Mr. O'Shea: They did, if your Honor please.

"The Court (continuing): By allowing the jury to consider other negligent acts.

60 "Mr. Bilbrey: The Court in that case used the language 'some negligence,' and that referred to the negligence that had been proved under the count of the indictment. Here it alleges general negligence in driving this motorcycle against the police patrol; driving it against the curbstone.

"The Court: That is the second count.

"Mr. Bilbrey: No, sir, this is the first count.

"Mr. O'Shea: But you tell us in the second count how we did it. You told us specifically what we were called upon to meet. In the first count you do not tell us anything, except that you have a general averment that we did this.

"Mr. Bilbrey: General negligence.

"The Court: I am going to let the Court of Appeals settle it. I will not disturb it. I will let it go to the jury.

"Mr. O'Shea: Exception.

"Mr. O'Shea: May it please the Court and you gentlemen of the jury, it now becomes my duty to explain to you how this unfortunate thing took place.

"We expect to show you that the defendant was riding on his motorcycle on this night and that he had as his friend this man Williams on the back part of the motorcycle; that he came down New Hampshire Avenue, and the patrol wagon loomed up in front of him; that he made an effort to get away from it and the patrol wagon hit him, or he hit the patrol wagon, as a result of which this unfortunate accident took place.

61 I think at the outset it is well to say to you men that there is a second count in the indictment which charges that the defendant was under the influence of liquor. Now, it may be conceded, I think, by the Government, and I take it his Honor will tell you, that there is not any evidence in the case at all about that, and there is nothing to substantiate that charge."

That then and thereupon the defendant to maintain the issues on his part joined called one HENRY BOWIE, who testified substantially as follows: That he is the proprietor of the Harley Davidson Motorcycle Company; that he knows James Clifton; that in April 1920 he recovered a motorcycle at No. 7 Police Precinct. That it belonged to James Clifton; that when he got the machine from No. 7 Police Precinct the rear end of the motorcycle was pushed in on the left side, and the right handle bar, which is in front of the machine, was scraped and bent a little. That the back part of the motorcycle is



where they have a seat, what they call a tandem seat, that is for another passenger. The tandem was bent in that direction, as if it had been struck by something, or it had struck something and pushed it over; it was to the left; he kept the motorcycle at his place for a considerable time and it was resold to a party named Eppes; Clifton sold it to Eppes. That he sent one of his men over to No. 7 for the machine to bring it to his place; that Johnson went for it, he is one of the men in Bowie's place of business; he is here today. That

62 witness looked at the steering mechanism, the round part of the motorcycle at No. 7 Police Precinct; it was all right.

We ran it over under its own power, and the only thing we did to carry it over was to straighten the handle bar a little; nothing the matter with the brakes or steering mechanism.

#### Cross-examination:

If the motorcycle was sitting in front of witness, this is the rear end back here, the tandem was bent this way (showing), the tandem is the rear seat. It was pushed from the left; mashed from the left to the right.

That then and thereupon the defendant to further maintain the issues on his part joined called one IVAN M. JOHNSON, who testified substantially as follows: That he lives at 734 13th St. S. E.; that he knows James Clifton; that in April, 1920, witness had occasion to go to No. 7 Police Precinct in Georgetown to get a motorcycle there; that it belonged to James Clifton; that it was in the basement of No. 7 Police Precinct when witness got it; that the right handle bar was bent up in the air, and the tandem, that is, the rear seat on the motorcycle, was pushed from the left side over to the right side. Mr. Bowie was not with witness at the time; that witness got it a few days after the accident. Clifton was in jail at the time; witness went over there and got an order to get the motorcycle from No. 7 Police Precinct. When witness saw him in jail, Clifton was all bandaged up; his arm was bandaged up and his face was bruised up and scratched up, after witness got the motorcycle witness pushed it out and bent the handle bars down straight and kicked it over and brought it back to the motorcycle shop; by kicking it

63 over witness means he kicked the starter in order to start the engine to make it run, other than the handle bars and the tandem there wasn't anything the matter with it. The steering mechanism was absolutely all right and the running power was all right.

#### Cross-examination:

There was nothing bent out of shape on the mud guard; not that witness could see, not that he recalls. Did not make any examination of the mud guards; witness got the motorcycle and pushed it out in front and straightened the right handle bar which was up in the air. Witness does not know how this right handle bar came to be placed out of position, or how the tandem got twisted out of



position. That witness does not know whether there were any repairs made on it prior to his taking it.

That then and thereupon the defendant to further maintain the issues on his part joined called one JAMES CLIFTON, who testified substantially as follows in his own behalf: That he lives at 1511 22nd St. N. W.; that he is a janitor at the Parkwood and at 1311 22nd St. N. W.; Janitor at two places; that he is married; that on the night of April 9, 1920, he recalls having seen George Williams; that he saw him at his (witness') house, 2316 L St. N. W. As witness was coming down New Hampshire Avenue and near the corner of Q Street, as witness looked to his left, some automobile was right on me, and witness just swerved to the right a little bit, and that is all witness remembers. After witness saw that it was apparent  
64 that it was going to be an unavoidable accident, he sort of turned a little to the right, and fed it up with gas, speeded up just a little bit. Witness did his utmost to avoid it; that the next witness remembered he was in Emergency Hospital being bandaged up; witness' head was cracked here, or at least cut; a tooth was knocked out; my knee was fractured; my right knee; my left arm was broken. Witness stayed in the Hospital three days and they sent him to the Washington Asylum on Monday. Tuesday, they carried him to jail, and witness stayed there three days; that witness then went home.

#### Cross-examination:

That witness was driving on the right hand curb; about five feet from the right hand curb. The street is a wide street there; there was nothing to obstruct his view directly in front of him; when the witness first saw the patrol it was just in the act of hitting him; it wasn't far away at all. It was just to the left. It might have been a little closer than the distance between the Assistant District Attorney, Mr. Bilbrey, who was cross-examining witness, and the witness; did not hear any gong ring or anything of that sort; from where witness was going along New Hampshire Avenue he could also look down 18th St. and across Q Street, but he did not. He looked to his left, but never looked down 18th. When witness crossed Cochran Street he could see clear down to Q Street; that witness doesn't say he could look over those little shrubs in that little parkway on the point there between 18th St. and New Hampshire Ave.; witness doesn't know if it is not very high; witness was looking down New Hampshire Avenue all the time he was coming  
65 down Cochran St. to Q St. until he neared the corner; witness doesn't exactly remember how near he was to the corner when he stopped looking down. The corner was New Hampshire Ave. and Q St. It was about as far as from here (indicating) to the end of the room away from the corner when witness stopped looking down the street; witness did not see the patrol wagon until it was right on him; the patrol wagon had not got across New Hampshire Avenue; witness went to go by the patrol and it hit him right in



the back; witness doesn't exactly remember how far the patrol had gotten across the street; witness estimates that he was about down to five feet of the right hand curb. Witness could not tell exactly where the patrol had gotten, because all he remembers he looked on the left and when he saw the patrol, that is all he remembers about where the patrol was. I was on the right hand side of New Hampshire Avenue, going down the street when witness saw the patrol. He swerved a bit to the right; then witness doesn't remember anything else. Witness does not know where they hit him; witness knows that he did not hit them; because when I looked the patrol wagon was like this (indicating); the patrol was sort of back behind me like this (indicating); witness has a recollection of his arm being broke and his head knocked open. After the patrol struck me I don't remember any more. He don't remember anything else except that he was in the hospital. As witness was going to New Hampshire Avenue and Q St., the first he saw of the patrol was to his left like that (indicating). Witness was a little in front of the hood. Wit-

66      ness swerved to the right of the patrol when he first saw it. Witness first saw the patrol when it was in the act of hitting him. He swerved to the right when it was in the act of hitting him. Witness did not see the patrol wagon until it was in the act of hitting him. It witness said anything contrary to that it was a mistake. When witness was coming down New Hampshire Avenue he did not see the patrol. Just as witness went to cross Q St. he saw the patrol and the patrol was then directly on his left and witness swerved to the right, then witness doesn't remember anything more; witness does not know exactly how fast he was going that night; witness had been going from the Portsmouth Apartment house; witness did not have his cut-out open; never had it open in the city; witness goes under the name of James E. Clifton or James Ellis Clifton; he is thirty years old.

That then and thereupon the following occurred:

I will ask you if on September 5, 1917, you were not arrested and convicted in Police Court for driving a motorcycle more than twenty miles an hour, on the complaint of J. Bobo?

"Mr. O'Shea: I object to this question, may it please the Court, unless the District Attorney has the proof. I object to his exhibiting a paper in front of this jury and reading from it, unless he has proof of what he asked this witness.

"The Court: I think the question is a proper one.

"Mr. O'Shea: I take it that you overrule the objection, then?

"The Court: Yes.

67      "Mr. O'Shea: Allow me an exception. Also, to the displaying in front of this jury this paper. We reserve an exception to that.

"The Witness: I was not convicted in Police Court. No, sir; never have been.

"Mr. Bilbrey: Were you convicted in Juvenile Court——

"Mr. O'Shea: Now wait a minute, please. If your Honor please, that is error, may it please the Court, because the Congress of the



United States has said that even if a boy were convicted in Juvenile Court, it is not to be used against him in a case like this. I make the further objection to it upon that ground. It is misconduct on the part of the District Attorney that I am objecting to in this case, may it please the Court. I want to reserve an exception to his attitude.

"The Court: Well, the defendant denies it. That ends it.

By Mr. Bilbrey:

"Q. I will ask you if on May 24, 1918, you were not arrested and convicted in Police Court of driving a motorcycle thirty miles an hour on the complaint of W. M. Warren?

"Mr. O'Shea: May I have an exception to this, and to even the asking of the question, unless the District Attorney has the proof to back up the situation here? I ask that a juror be withdrawn on account of the misconduct of counsel.

"The Court: Objection over-uled.

"Mr. O'Shea: We reserve an exception.

68 "Witness: I have never been convicted in any Court; Police Court or any other court.

Mr. Bilbrey: Did you forfeit collateral?

A. I forfeited——

Mr. O'Shea: Just a minute, please, just a minute. I object to that. You see how desperate my friend is. Now, we are at the stage where he wants to know if the defendant forfeited collateral. That is not the law, as I understand it. The law says conviction.

The Court: I think that question ought not to be put. There is too much danger in it. People might be willing to forfeit collateral and be perfectly innocent in a given case. The objection is sustained.

69 Witness has been driving a motorcycle since 1917.

Redirect examination:

In response to a question by the Court witness stated that about half a block (it might be a whole on-, witness is not sure of that) above the parking 18th St. in its northerly course, merges into New Hampshire Avenue; the park is practically in the middle of New Hampshire Avenue, and 18th St. and Q St., the park is bounded on one side by 18th St. on the left side by 18th, on the right by New Hampshire Avenue, and the other side by Q St. on the left side as you go south, the southerly end or point of this little park is right at the north side of Q St. Witness does not think that the northerly end of the parking is much less than a half square from Q St.

That then and thereupon the defense announced its case as closed. The Government offered no rebuttal.

The prayers for instruction to Court by counsel for the defendant are in words and figures following, to wit:

"In the Supreme Court of the District of Columbia, Holding a Criminal Term.

Criminal. No. 36456.

UNITED STATES

vs.

JAMES CLIFTON, Defendant.

*Defendant's Prayer No. 1.*

70 "The jury are instructed that under the evidence they should acquit the defendant.

Denied.

Ex.

F. L. S.

*Prayer No. II.*

If the jury find from the evidence that the defendant was not criminally negligent but that George Williams met his death by misadventure or accident they should acquit the defendant.

Denied.

Ex.

F. L. S.

*Prayer No. 3.*

If the Jury are not satisfied beyond a reasonable doubt, that the defendant at the time and place in question was grossly negligent in his management of the motor cycle and also that such negligence caused the death of Williams as charged, they should acquit the defendant.

Granted as modified.

Ex.

F. L. S.

*Prayer No. 4.*

The intent necessary to convict in this case can not be supplied by any alleged violation of any police regulation or city ordinance, because there was no proof adduced in this case of any alleged violation of a police regulation or city ordinance.

Denied.

Ex.

F. L. S.

71

*Prayer No. 4.*

The crime sought to be proven here is involuntary homicide, caused by culpable negligence, and to make an act carelessly performed resulting in death, a criminal one, the carelessness must have



been gross, implying an indifference to consequences; and the term gross negligence means something more than mere negligence. It means wantonness, and disregard of the consequences which may ensue and indifference to the rights of others.

Granted.

F. L. S.

*Prayer No. 6.*

The jury are instructed that in deciding whether the conduct of the accused was criminal in its nature, they should consider his conduct as judged by the situation and circumstances as they appeared to him at the time.

Denied.

Ex.

F. L. S.

*Prayer No. 7.*

Gross negligence means something more than mere negligence, that is the failure to use the care of an ordinarily prudent man, and implies a somewhat aggravated kind of negligence, a wantonness and disregard of consequences which may ensue and indifference to the rights of others.

Denied.

Ex.

F. L. S.

72

*Prayer No. 8.*

The jury are instructed that, if they can fairly reconcile all the testimony in the case with any reasonable hypothesis of the defendant's innocence, it is your duty to do so, and in such event you should find him not guilty.

Granted.

F. L. S.

*Prayer No. 9.*

The jury are instructed that, although defendant was driving his motorcycle at an excessive rate of speed, unless they believe beyond a reasonable doubt that the proximate cause of death was due to the excessive speed, recklessness and gross negligence of defendant, and that death ensued as a result of the excessive speed, recklessness and gross negligence, their verdict should be not guilty.

Denied.

Ex.

F. L. S.

*Prayer No. 10.*

The jury are instructed that not every act of carelessness or negligence renders a party guilty of manslaughter. The case may be

one of misadventure, and, to warrant a conviction, there must have been gross negligence which directly caused death or else their verdict should be not guilty.

Denied.

Ex.

F. L. S.

*Prayer No. 11.*

The jury are instructed that, although a wilful violation of the Statute might be negligence, it does not follow that such negligence would under the circumstances in each case amount to manslaughter.

73        Withdrawn.  
          F. L. S.

*Prayer No. 12.*

The jury are instructed that if they find from the evidence that the defendant drove the motorcycle at a greater rate of speed than prescribed by law that does not necessarily establish the degree of negligence required to convict, but they they must find from all the evidence beyond a reasonable doubt that there was gross negligence on the part of the defendant and that the death of the deceased was the direct result of the alleged gross negligence of the defendant.

Denied. Ex.

Ex.

F. L. S."

Whereupon counsel for the Government and counsel for the defense, proceeded with the argument to the jury.

The Court charged the Jury as follows:

"The Court (Mr. Justice Siddons): Gentlemen of the jury, the indictment in this case contains two counts. In the first count, the defednant Clifton here is charged with having violently, feloniously, wantonly, recklessly and negligently forced, driven and run a motorcycle against a police patrol wagon, and negligently forced, drove and run the motorcycle into a curbstone, and as a result of that concatenation of circumstances, threw his companion who was riding on the seat back of him on the motorcycle to the ground in a way that caused his death.

74        "The second count in this indictment charges the same gross and reckless negligence, but it undertakes to specify several ways in which it is claimed he was negligent; and the specifications are that he operated this machine along a public highway at a great, excessive, unlawful and dangerous rate of speed; and that while operating and driving the motorcycle along such public highway he did fail and neglect to attend to and control the steering mechanism and brakes of the motorcycle; and did fail and neglect to keep an outlook for other vehicles, and that as a result of one or the other of all of those specific acts of negligence charged here,



the collision occurred which it is charged resulted in the death of Williams.

"Now, a charge such as we find here either in the first or second count of this indictment, charges what we sometimes call involuntary manslaughter. It is a case where it is charged that a man riding a motorcycle on the public streets of the city drove it with such reckless disregard of the rights of others that he brought about the collision which cost his companion's life. Of course, I am sure, gentlemen of the jury, that you will realize that there are degrees of negligence in the operation of vehicles, machines, automobiles. You or I might engage in driving our machine upon the public street and exhibit some carelessness and negligence in so doing, so that we injure somebody else, come into collision with somebody elses' machine and do damage which exposes us to a civil action for damages. It must appear that there was negligence on the part of the defendant so sued, but the negligence that is sufficient to sus-

75      tain a civil action for *for* damages will not sustain an indictment charging manslaughter. In that case the negligence has to be of a much higher degree, if I might use such an expression. The negligence must be gross.

How do we test gross negligence that is alleged against somebody that is driving an automobile upon the public streets of a city. Is it done recklessly? Is it done with apparent indifference to the rights of pedestrians, or other drivers of vehicles? If it is, it is wanton, it is gross negligence, and if the doing of that sort of a negligent act while driving the machine costs a citizen his life, the party responsible for it can be made to respond in a criminal court under an indictment charging him with involuntary manslaughter.

Now, that is what is charged against Clifton in this case; that he was so operating his motorcycle on the occasion in question, operating it in such a grossly negligent manner, so recklessly and with a spirit of indifference to the rights of others, and this collision being brought about by such act of negligence, resulting in the death of Williams, then it is claimed that he is guilty of manslaughter.

Now, you have heard the evidence in this case. In directing your attention to the question of whether or not this man was negligent, as charged in this indictment, on the occasion in question, you are of course dependent entirely upon the evidence in the case.

The speed with which a man is driving a machine may very often touch upon the question of whether he is acting negligently or otherwise—grossly negligent or otherwise. A man driving  
76      through the public streets of Washington at 40 or 50 miles an hour and runs into a vehicle and he either throws off somebody that is riding on his own vehicle, or somebody that is riding in a vehicle that he strikes, and that party dies—the jury might find negligence of the gross character that I have indicated must appear in a criminal case of this character before the jury would be warranted in convicting.

Now, there is evidence tending to show here that Clifton was seen on this motorcycle a square or more north of the scene of the lament-



able occurrence. There is evidence tending to show that he was first observed at some point north of Corcoran Street, the accident, it is said, occurring where Q Street and New Hampshire Avenue cross one another. Well, at what rate of speed—if he was there when he was first observed, as this police patrol went west crossing New Hampshire Avenue, or began crossing or approaching the crossing of Q and New Hampshire Avenue, what speed was Clifton traveling that enabled him to reach this point of the collision by the time the patrol wagon could cross, as far as it did cross, New Hampshire Avenue. Was there a warning of any kind given? What was the movement of the machine? What was the movement of both of the machines—that is, the motorcycle and the patrol wagon at this time. How did this thing happen? Was it caused by an effort on the part of the patrol driver to beat Clifton across New Hampshire Avenue. Of course, if it is the patrol wagon driver's fault, that ends the case against Clifton and you must acquit him. But, did it happen in that way?

77 There is evidence tending to show that this police patrol wagon was proceeding westerly on Q Street, somewhere in the neighborhood of eight or nine or ten miles an hour, and was followed by another machine driven, it is said, by the witness Cunningham, who preceded the witness Sergeant Easley—together with Mrs. Cunningham, some feet back of the patrol wagon; following it. Where was the patrol wagon when the driver first saw or anyone saw Clifton approaching in a southerly direction along New Hampshire Avenue?

There is testimony tending to show that it was seen just about the time the patrol wagon was entering upon this crossing. As I understand the testimony, about that point, 18th Street supervenes between the east side and New Hampshire Avenue. According to Clifton's response to some questions that I put to him, 18th Street and New Hampshire Avenue blend just above this little circle, a short distance above Q Street. Now, the patrol wagon was going west on Q Street, approaching New Hampshire Avenue, if that testimony is correct, and you accept it as true, and Clifton, it is said, is observed by one of the occupants of the patrol wagon north of Corcoran Street. Now, is that so? If that is so, what distance did Clifton have to cover to reach the point of collision, assuming, if it be a fact, that the patrol wagon was making its passage across New Hampshire Avenue at the rate of eight or nine or ten miles an hour, as the case may be, according to the view that you take of the testimony relating to that aspect of the case.

78 There is testimony tending to show that as Clifton reached the patrol wagon he swerved to the right, one witness testifying, if I remember, that he appeared not to exactly wobble, but to move to the right and then to the left, as if he were uncertain. There is other testimony tending to show that he made a movement to the right, and then there were one or more witnesses testified—you will remember how many there were, whether there was more than one and what the testimony was—there is testimony tending to show that he then sought to cut around in front of the



automobile. There is testimony tending to show that there was a collision between the motorcycle and the patrol. There is testimony tending to show that the motorcycle ran into the patrol wagon. There is evidence tending to show—I think the evidence of the defendant himself—that the patrol wagon ran into him. That may become quite important in determining this question. How did that happen? Did the motorcycle run into the patrol wagon or did the patrol wagon run into the motorcycle?

There is evidence tending to show that having passed around in some way the motorcycle then struck the curb. One witness said the southwest curb. There is evidence tending to show that the body of the dead man Williams was thrown from the motorcycle, by force of the collision, against the curb, if it was so thrown there, on to the sidewalk, and was found, if I remember the testimony, some five or six feet south of the curb line of Q and New Hampshire Avenue, as I recall the testimony, on the New Hampshire Avenue sidewalk. Is that correct?

“Mr. Bilbrey: Yes, that is correct, if your Honor please.

79 “The Court: There is evidence tending to show that after that had been done the motorcycle travelled still thirty or forty feet, whatever the distance was, further south, and again struck the curb.

There is evidence tending to show that at that time it threw the defendant off, and there is evidence tending to show that it then passed on and fell itself somewhere in the middle of New Hampshire Avenue. Now, whatever view you may take of that testimony, and which of it you accept as true, for it is for you to say, but all of these facts, in so far as you find them to be the facts, may enable you to determine whether this defendant was grossly negligent under this indictment.

Of course, as counsel for the Government says, Clifton never started out on that night to do this thing. Nobody claims or pretends that he intended by his action to cause his companion to lose his life; but his companion did lose his life. His companion, his fellow citizen, is in his grave as a result of what occurred there. The question is whether the defendant is responsible for it—criminally so. That is, if he, by a grossly negligent act, in driving in one of the ways I have indicated to you, and as charged in this indictment—is grossly and negligently operating this motorcycle, brought this thing about. That is the question for you gentlemen to determine.

I have granted three prayers at the instance of the defendant, which I will read to you. First I will read to you defendant's prayer No. 5.

80 “The crime sought to be proven here is involuntary homicide, caused by culpable negligence, and to make an act carelessly performed resulting in death, a criminal one, the carelessness must have been gross, implying an indifference to consequences; and the term gross negligence means something more than mere negligence. It means wantonness, and disregard of the consequences which may ensue and indifference to the rights of others.



"If that is the kind of evidence—gross negligence, it will sustain a charge such as we find in this indictment.

"I will read to you defendant's prayer No. 3, which I have granted."

'If the jury are not satisfied beyond a reasonable doubt that the defendant at the time and place in question was grossly negligent in his management of the motorcycle and also that such negligence caused the death of Williams as charged, they should acquit the defendant.'

"Of course, gentlemen of the jury, before you would be warranted in returning a verdict in this or in any other criminal case, you must be convinced beyond a reasonable doubt that the thing charged against the accused took place. Otherwise it is a mere matter of suspicion with the jury. That is not enough, and they should acquit in that event. You must be convinced beyond a reasonable doubt.

"The burden of convincing the jury by evidence is upon the prosecution in a criminal case. Something I am sure that many of you have been told many times, I know I have occasion to reiterate it many times. The burden of proof beyond a reasonable doubt, in this case, is upon the prosecution. Before you would be warranted

81 in finding the defendant guilty, it must appear from the evidence beyond a reasonable doubt that he was grossly negligent in the operation of the motorcycle in the manner alleged in the first count and the second count, or either of them, of this indictment, and that that negligent act cost Williams his life.

"I will read to you the defendant's prayer No. 8, which I have also granted."

"The jury are instructed that, if they can fairly reconcile all the testimony in the case with any reasonable hypothesis of the defendant's innocence, it is your duty to do so, and in such event you should find him not guilty.'

"That suggests that I state to you, gentlemen of the jury, that there is a cardinal principle of our criminal jurisprudence, which is that everyone is presumed to be innocent until proven guilty. A defendant accused of crime is presumed innocent until or unless twelve men hearing the evidence in the case shall decide otherwise. So, cases arise where the jury deliberating and considering the evidence in the case may see a hypothesis of guilt and a hypothesis of innocence. If that is the way the evidence strikes you, that there is a reasonable hypothesis of innocence, the defendant is entitled to the benefit of that and the verdict should be for acquittal in such a case. But the law only exacts reasonable things. A reasonable doubt, a reasonably hypothesis of innocence.

"So, gentlemen of the jury, you will take this case and look at the evidence, guided in doing so by these principles of law which I have given you for your consideration and by which you must be controlled, and reach such conclusion as you may from  
82 that."

That then and thereupon the defendant's counsel renewed his exception to the refusal of the prayers, and also took an exception



to the Court definition of the test of gross negligence as it was given to the Jury.

Counsel for the defendant also took exception to the Court's statement about the bearing that the speed might have upon the defendant- innocence or guilt.

Counsel for the defendant also took exception particularly to the Court's review of the testimony before this jury.

And thereupon the jury retired and thereafter returned its verdict.

All and every of the exceptions hereinbefore stated and taken were duly noted by the Court on its minutes, and the time that the same were severally noted and taken, and before the Jury retired to consider of its verdict; and the defendant, by his counsel, moved the Court to sign this, his bill of exceptions; to have the same force and effect as to each and every of the said exceptions, as though the same were set forth in a separate Bill of Exceptions, which motion is granted; and the Court accordingly signed this, the defendant's Bill of Exceptions, to have the force and effect as aforesaid now for then this 1st day of December, A. D. 1922.

F. L. SIDDONS,  
*Justice.*

Notice.

Service of Copy.

[Endorsed:] Ch. No. 36456. U. S. v. James Clifton. B. of Excp. Clerk please File.

Endorsed on cover: District of Columbia Supreme Court. No. 3946. James Clifton, appellant, vs. United States. Court of Appeals, District of Columbia. Filed Jan. 19, 1923. Henry W. Hodges, clerk.